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No. 92-922

In The

Supreme Court of the United States

October Term, 1992

JAMES L. POLK and MATTIE B. POLK,

Petitioners,

v.

DIXIE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Polks' filing of an improper petition, without service upon or any other form of notice to Dixie Insurance Company within the allowed time, renders the Polks' current petition, which was filed and served outside the established ninety-day time period, improper for consideration.

2. Whether the neutral, non-racial reasons for striking two potential black jurors in this case meet the test established in *Batson v. Kentucky*, 476 U.S. 79 (1986), for peremptory strikes.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioners, James L. Polk and Mattie B. Polk, and the respondent, Dixie Insurance Company.

The Senatobia Bank, the lienholder on Mr. Polk's automobile, was a defendant in the district court but was dismissed by stipulation of dismissal with prejudice on February 17, 1988.

Dixie Insurance Company, now known as Infinity Insurance Company, is a wholly owned subsidiary of the Penn Central Corporation. The Penn Central Corporation is a public stock company, the majority of its stock being owned by American Financial Enterprises.

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BRIEF IN OPPOSITION

Respondent Dixie Insurance Company [Dixie] respectfully requests this Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The August 4, 1992, opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at *Polk v. Dixie Ins. Co.*, 972 F.2d 83 (5th Cir. 1992). It is attached as an Appendix to the Petition.

Other reported decisions in this case, in reverse chronological order, are as follows:

Polk v. Dixie Ins. Co., 943 F.2d 553 (5th Cir. 1991);

Polk v. Dixie Ins. Co., 111 S. Ct. 2791 (1991); and

Polk v. Dixie Ins. Co., 897 F.2d 1346 (5th Cir. 1990).

JURISDICTION

Although the Polks state that jurisdiction is proper in this case pursuant to 28 U.S.C. § 1254, respondent Dixie Insurance Company contests whether the petition was timely filed and properly served pursuant to 28 U.S.C. § 2101(c) and the Rules of the Supreme Court of the United States. Dixie's argument regarding this issue is set out more fully below in Point I of the Argument for Denying the Petition.

STATEMENT OF THE CASE

The Statement of the Case found at pages 2-4 of the Polks' petition must be supplemented.

At the hearing on remand to determine whether the black members of the jury panel were stricken for non-racial reasons, counsel for Dixie Insurance Company stated that the main reason for her striking the potential jurors at issue was lack of "eyeball contact." (VI R. 8.) Although admitting that she did not remember the exact details, since over three years had passed and the law had not required reasons to be given in civil cases at that

time, on cross-examination by Petitioners' counsel, counsel for Dixie again stated her reason for excluding the potential jurors was lack of eyeball contact.

> Q: And up until today, up until you got up here and gave your statement just now, the only reasons that have ever been assigned by you until right in January of 1992 for excluding these jurors was eyeball contact. Is that not true?
>
> A: That is true then, it is true now, and eyeball contact is the one, and when I said eyeball contact, eyeball contact is not just looking at me, it is the expression on their face when they are looking at me, whether there is a smirk or smile or rolling their eyes, it is the impact of the eyeball contact, if any.
>
> Q: And, so that is your reason as of right now for excluding the jurors, eyeball contact?
>
> A: It has never changed. It was that the day it happened, it was that the day I signed the affidavit, and it is true today.

(VI R. 15-16.)

Again, on cross examination, Dixie's counsel unequivocally stated her reason for excluding the potential jurors.

> Q: It's your testimony that you don't have any specific recollection of why you excluded the jurors that you excluded, is that a fair statement?
>
> A: It was eyeball contact. *I can tell you that for sure*, and in the eyeball contact, they either weren't looking at me or they were looking

> at me and I thought they were not listening to me when I had eyeball contact.

(VI R. 20.) (Emphasis added.) The fact that Dixie's counsel places great weight on eye contact is evidenced in the following statement made during voir dire, "Good morning, I'm going to ask you some questions, and when I do, I need you to *open your eyes up* and raise your hand. . . . " (IV R. 21.) (Emphasis added.)

While testifying that eye contact was the primary reason for striking the potential jurors, counsel also offered secondary reasons in support of these peremptory strikes. Notes of co-counsel from the trial revealed that one of the jurors struck was an insurance clerk for a company that wrote fire insurance policies. As testified to at the hearing, it is standard practice for Dixie's counsel to excuse members of any industry that is affiliated with the case being tried. Thus, because this case actually involved questions of coverage on an automobile policy following the destruction of the vehicle by fire, counsel testified that this juror would have been stricken under this practice. As stated at the hearing, "I would not want someone who comes into the room with barrels of expertise that would have an impact on tainting the entire jury. . . . " (VI R. 17-18.)

Co-counsel's notes showed the other black panel member at issue to be unemployed. Again, counsel for Dixie testified that striking this juror would have been consistent with her usual practice of striking any potential juror who is unemployed. (VI R. 10.) That the white member of the venire struck was also unemployed reiterates the testimony on this issue.

On page 3 of their Statement of the Case, the Polks state, "The insurance company bolstered racial aspects of the case by asking Polk about his illegitimate children." It should be noted that it was counsel for the Polks who initially addressed the issue of race. (IV R. 19.) In fact, nowhere in the record does counsel for Dixie state or insinuate that the race of the plaintiffs or jurors was of any concern. The line of questioning regarding Polk's children related directly to Polk's motive for driving home on the night of the alleged accident instead of staying at the home of his girlfriend – such motive having been placed in issue as a result of Petitioners' counsel's direct examination of James Polk.

Finally, perhaps because it does not comport with their argument that they were unable to rebut Dixie's counsel's articulated reasons, Petitioners failed to mention in their Statement of the Case that they actually called a rebuttal witness at the hearing. (VI R. 22-24.)

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

This petition should be denied because of Petitioners' failure to file and serve a proper petition within the ninety days allowed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13. The improper petition filed within the ninety-day time period was not served on Respondent Dixie Insurance Company and was rejected by the Clerk of the Supreme Court for not meeting the printing requirements of the Supreme Court Rules and for not being accompanied by a motion to proceed *in*

forma pauperis. The failure to timely file the petition divests the Court of jurisdiction to consider same. Alternatively, even if the improper petition filed within the ninety days meets the jurisdictional requirements, Petitioners' intentional disregard of this Court's procedural guidelines justifies the denial of the petition in this case.

Contrary to Petitioners' arguments, the Fifth Circuit's decision in this case is consistent with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Counsel's articulated reasons were related to the particular case to be tried even though, because over three years had passed since the voir dire in this case, specific details could not be recalled. Additionally, *Batson's* requirement that the reasons be "clear and reasonably specific," *Batson*, 476 U.S. at 98 n.20, was met. Petitioners' argument that the reasons stated did not allow a rebuttal is inconsistent with their extensive cross-examination of Dixie's counsel and their actually calling a rebuttal witness at the hearing on remand. Further, Petitioners' assertion that peremptory strikes should be abolished to fulfill their "right to have blacks on a jury" is inconsistent with prior rulings of this Court. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), *quoted in Holland v. Illinois*, 493 U.S. 474, 483 (1990), *reh'g denied*, 494 U.S. 1050 (1990). The Fifth Circuit, in affirming the findings of the trial court, was merely following the standards for appellate review established by this Court in *Batson* and *Hernandez v. New York*, 111 S. Ct. 1859 (1991).

The Fifth Circuit's opinion is also consistent with other circuit courts' decisions involving similar facts. As to the failure of Dixie's counsel to recall specific details, the Fifth Circuit relied on decisions rendered by the

Eighth Circuit, *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989), and *United States v. Wilson*, 867 F.2d 486 (8th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989). The facts in these cases more closely resemble the facts in this case than the one Third Circuit case cited by Petitioners, *Harrison v. Ryan*, 909 F.2d 84 (3rd Cir. 1990), *cert. denied sub nom. Castille v. Harrison*, 111 S. Ct. 568 (1990), or the cited district court opinion, *United States v. Cunningham*, 713 F. Supp. 165 (M.D.N.C. 1988).

The Fifth Circuit's upholding of the finding of no discrimination based on the stated reason of eye contact is not only consistent with the one case cited by Petitioners on this issue, *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990) *reh'g denied*, 920 F.2d 13, (11th Cir. 1990), *cert. denied sub nom. Barfield v. Lamar*, 111 S. Ct. 2263 (1991), but it is also consistent with decisions rendered in the Third, Seventh, and Eighth Circuits. *United States v. Casper*, 956 F.2d 416 (3rd Cir. 1992); *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121 (7th Cir. 1992); *United States v. Swinney*, 970 F.2d 494 (8th Cir. 1992), *cert. denied*, No. 92-6413, 1992 WL 331988 (U.S. Nov. 30, 1992); *United States v. Todd*, 963 F.2d 207 (8th Cir. 1992); *Reynolds v. Benefield*, 931 F.2d 506 (8th Cir. 1991); *United States v. Sherrills*, 929 F.2d 393 (8th Cir. 1991).

Finally, this case is not unique in finding no discrimination even though all minority members were stricken. *See Dunham*, 967 F.2d at 1122; *Reynolds*, 931 F.2d at 508; *Barfield*, 911 F.2d at 646. The two Fifth Circuit cases cited by Petitioners on this issue, *Moore v. Keller Indus.*, 948 F.2d 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1945 (1992), and *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988), do not, of course, show a conflict between circuit

courts on this issue. Petitioners mischaracterize the holdings in the other two cases cited, *United States v. Chincilla*, 874 F.2d 695 (9th Cir. 1989), and *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), *reh'g denied*, 490 U.S. 1014 (1989). In fact, *Roman* is not even a case in which all members of a particular race were excluded from the jury. Nevertheless, none of these cases mandate a finding of discrimination merely because all minority members of the jury panel were stricken.

Because Petitioners failed to timely file and serve a proper petition and because they cannot show a conflict between the Fifth Circuit's decision in this case and either this Court's precedents or the decisions of other circuit courts, the petition for a writ of certiorari in this case should be denied.

ARGUMENT FOR DENYING THE PETITION

I. Petitioners failed to properly file and serve their petition for writ of certiorari within the prescribed ninety-day time period.

Judgment was entered by the United States Court of Appeals for the Fifth Circuit in this case on August 4, 1992. Accordingly, pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 12 and 13, a petition for writ of certiorari should have been filed with proof of service by November 2, 1992. This did not take place. Not until November 13, 1992, did Dixie Insurance Company receive a copy of the Polks' petition in this matter. The letter to the Clerk of the Supreme Court which accompanied the

petition was dated November 11, 1992, and stated, "Consistent with my certificate of service, I am today forwarding a true and correct copy of the Petition to opposing counsel." Clearly, Dixie was not served until after the deadline for the Polks' petition. Furthermore, proper copies of the petition were not filed until after the deadline.

Apparently, some form of a petition was filed on October 29, 1992. The petition filed at that time was rejected by the Clerk of the Supreme Court because no motion to proceed *in forma pauperis* in order to be exempt from the printing requirements of the Supreme Court Rules accompanied the improper petition. Furthermore, Dixie was not served with a copy of this petition. Again, it was not until November 13, 1992, after the prescribed ninety days had passed, that Dixie first learned of the Polks' decision to seek a writ of certiorari in this case.

The Polks proceeded in a similar fashion when seeking a writ previously in this case. An earlier opinion from the Fifth Circuit, *Polk v. Dixie Ins. Co.*, 897 F.2d 1346 (5th Cir. 1990), was entered on April 11, 1990. On July 9, 1990, the Petitioners filed a petition for a writ of certiorari which did not comply with the printing requirements of the rules of this Court. By letter dated July 12, 1990, the Clerk of Court advised the Petitioners' attorney that the petition must be corrected and that upon receipt of a corrected petition, it would be filed as of the date of the original petition. The corrected petition was not received by the Clerk until August 6, 1990.

Obviously, the theory of counsel for the Petitioners is to file something – *anything* – in this Court, regardless of

whether it sufficiently meets the requirements of the Supreme Court Rules, and then proceed at his leisure in filing proper copies of the petition. Absolutely no excuse was given for failing to follow the procedural guidelines established by this Court. Because counsel for the Polks has brought this same case before this Court previously and was at that time directed by the Clerk as to the proper requirements, he certainly cannot claim ignorance or inexperience. Rather, the previous incident serves only to illustrate his desire to take advantage of the Clerk's earlier generosity. To allow such flagrant disregard of the Court's procedural rules violates the very purpose of the rules and hinders the efficient administration of justice.

As stated in *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32, 32-33 (1966), *reh'g denied*, 385 U.S. 995 (1966):

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

Because the Polks failed to properly file and serve their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit within the prescribed ninety days as set forth in 28 U.S.C. § 2101(c) and Supreme Court Rule 13, proper jurisdiction is lacking in this case. Alternatively, even if the filing of some form of

a petition on October 29, 1992, meets the jurisdictional requirements, the lack of timely service upon the opposing party and proof of same, as required by Supreme Court Rules 12.1 and 29, and the failure to timely file proper copies and a docket fee, as required by Supreme Court Rules 12.1 and 33, or a motion seeking to proceed *in forma pauperis* as provided under Supreme Court Rule 39, justify a denial of the Polks' petition under the circumstances of this case.

II. The Fifth Circuit's opinion is consistent with this Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Hernandez v. New York*, 111 S. Ct. 1859 (1991).

Petitioners attempt to persuade this Court to grant their petition by arguing that the Fifth Circuit's opinion conflicts with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Their first argument is that Dixie's counsel failed to articulate a neutral explanation "related to the particular case to be tried." *Batson*, 476 U.S. at 98.[1]

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[1] Petitioners do not argue that the reasons articulated by Dixie's counsel were not racially neutral. A plurality of this Court stated in *Hernandez v. New York*, 111 S. Ct. 1859, 1866 (1991):

> A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Clearly, the reasons articulated by Dixie's counsel – eye contact and employment status – meet this standard.

While it is true that counsel stated she could not remember the specific details surrounding the striking of the jurors in this case, especially since over three years had passed and the controlling law at the time required no reasons to be given, she stated unequivocally that her primary reason was eyeball contact. She was certain that this was the reason for striking these particular jurors because that is always the basis for her use of peremptory strikes. In addition, counsel offered secondary reasons for striking each of the potential jurors. One was unemployed and one worked for an insurance company. Because counsel for Dixie prefers jurors who are employed, but not within the same industry as the party she represents, she stated that these were additional reasons for striking the panel members at issue. Clearly, counsel's stated reasons did relate to the particular case to be tried and were, thus, in conformity with *Batson's* mandates.

Petitioners next argue that the Fifth Circuit failed to follow *"Batson's* incorporation of the standard of" *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), *cited in Batson,* 476 U.S. at 98 n.20. Petitioners argue that the race-neutral reasons articulated in this case were not "clear and reasonably specific," as required by *Batson,* 476 U.S. at 98 n.20, since they were not precise enough to provide a target upon which to focus a rebuttal. While *Burdine,* within the Title VII context, does mention "the necessity of rebutting the inference of discrimination arising from the prima facie case," *Burdine,* 450 U.S. at 258, this language clearly refers to the role of those *accused* of discrimination, not the accusers. As for those claiming discrimination, *Burdine* merely states that they are to "be

afforded 'a full and fair opportunity' to demonstrate pretext." *Burdine*, 450 U.S. at 258. Such an opportunity was afforded the Polks at the hearing on this matter. In fact, Petitioners' argument that they could not properly rebut the reasons articulated in this case is particularly puzzling in light of the extensive cross-examination conducted by Petitioners' counsel as well as their actually calling a rebuttal witness at the hearing. (VI R. 22-24.) Perhaps their complaint is not so much that they could not "make a rebuttal," but that their rebuttal was unsuccessful.[2]

Petitioners go so far as to argue that the Fifth Circuit's decision in this case renders *Batson* illusory and that "only the elimination of peremptory challenges will suffice to afford black citizens the right to have blacks on a jury." Petition at 7. The importance of peremptory strikes, however, has consistently been recognized by this Court. *See, e.g., Georgia v. McCollum*, 112 S. Ct. 2348, 2358 (1992) (noting "the contribution of the peremptory challenge to the administration of justice"). Furthermore, this Court has recognized that although potential jurors may

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[2] In light of Petitioners' complaint that the articulated reasons in this case were subjective, as discussed more fully in Part III of the Argument for Denying the Petition, it should also be noted that the Court in *Burdine*, which is relied on so heavily by Petitioners, actually criticized the Fifth Circuit for placing too heavy a burden on a defendant in a Title VII case. *Burdine*, 450 U.S. at 256-58. The court stated further, "The Court of Appeals also *erred in requiring the defendant to prove by objective evidence* that the person hired or promoted was more qualified than the plaintiff." *Burdine*, 450 U.S. at 258 (emphasis added).

not be excluded merely because of their race, "[d]efendants are not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), *quoted in Holland v. Illinois*, 493 U.S. 474, 483 (1990), *reh'g denied*, 494 U.S. 1050 (1990). Thus, Petitioners' assertions are inconsistent with prior rulings of this Court.

In truth, Petitioners' request for a writ of certiorari in this case, as with their reasons for an appeal to the Fifth Circuit, is based not on a legal question which needs to be resolved, but on their disagreement with the district court's finding that Dixie's counsel's stated reasons were credible and were not racially motivated. Such is not the basis for either a reversal by an appellate court or the granting of a petition for a writ of certiorari by this Court.

This Court recognized in *Batson* that "[s]ince the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21. More recently, the Court stated:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez v. New York, 111 S. Ct. 1859, 1869 (1991) (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

The district court, at the hearing on remand in this case, found that the reasons articulated by counsel for Dixie were credible and were not racially motivated. The Fifth Circuit, recognizing the standard of review outlined in *Hernandez*, found as follows:

> Whether the striking party was or was not motivated by its proffered explanation is a fact-intensive question which must be decided case by case in light of the totality of circumstances. We cannot say that eye contact necessarily is a phony reason when it is proffered as justification for removal of all black jurors. On the record in this case, the trial court's conclusion that Dixie's counsel was not motivated by racial consideration is a permissible view of the evidence.

Polk v. Dixie Ins. Co., 972 F.2d 83, 86 (1992).[3]

Because the Fifth Circuit's decision in this case is consistent, contrary to Petitioners' assertions otherwise, with this Court's opinions in *Batson v. Kentucky* and *Hernandez v. New York*, the petition for a writ of certiorari should be denied.

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[3] The Polks, in their Reply Brief filed with the Fifth Circuit, actually argued that the appellate court should grant oral argument in this case in order to review the demeanor of Dixie's counsel for themselves. Reply Brief of the Appellants at 11-12. Even assuming that the same attorney would present the appellate argument if such were required, this requested procedure, which is in direct contradiction of this Court's rulings in both *Batson* and *Hernandez*, would quite clearly invade the province of the trial court as well as place an unnecessary burden on the federal appellate courts.

III. The Fifth Circuit's opinion does not conflict with other circuit courts' holdings which are based on similar facts.

After arguing that the Fifth Circuit's opinion in this case is inconsistent with this Court's ruling in *Batson*, Petitioners next attempt to persuade this Court to grant their petition by arguing that the Fifth Circuit's decision conflicts with decisions reached in other circuits. A closer reading of the cases cited by Petitioners, however, reveals the inaccuracy of these arguments.

Petitioners first argue that the Fifth Circuit's affirmance of the district court's findings is inconsistent with the holding in *Harrison v. Ryan*, 909 F.2d 84 (3rd Cir. 1990), *cert. denied sub nom. Castille v. Harrison*, 111 S. Ct. 568 (1990). Petitioners also cite to a federal district court opinion, *United States v. Cunningham*, 713 F. Supp. 165 (M.D.N.C. 1988). In both of these cases, the district court found that the prosecutor was unable to sufficiently set forth non-racial reasons for exercising his peremptory strikes. Accordingly, because "[t]he district court's factual determinations, including issues of credibility, are entitled to great deference and are not to be overturned unless clearly erroneous," *Harrison*, 909 F.2d at 86, the appellate court affirmed the district court's findings in *Harrison*.

Furthermore, in both cases cited by Petitioners, the prosecutors could not recall anything regarding their reasons for striking certain panel members. While thinking the strikes *may* have been for various reasons, the prosecutors could never say with any certainty. As the Fifth Circuit correctly noted, when distinguishing the factual

situation presented in *Harrison*, "That is not the situation here. Dixie's counsel maintains that she must have relied on eyeball contact because she always does and may have relied on other race-neutral factors in line with guidelines she generally follows." *Polk*, 972 F.2d at 85.

In reaching its decision, the Fifth Circuit relied on two opinions from the Eighth Circuit in which the factual patterns were more like the case at hand than the facts presented in *Harrison*. In *United States v. Nicholson*, 885 F.2d 481 (8th Cir. 1989), the court was presented with the following situation:

> Because the voir dire had taken place two years earlier and because he could not locate his notes made at the time, the prosecutor could not recall at the hearing the specific reasons why he utilized peremptory challenges against the three black venire members. Accordingly, the prosecutor presented a standard set of guidelines that he had used over several years to evaluate potential jurors.

Nicholson, 885 F.2d at 482. The Eighth Circuit Court of Appeals held, "Because we do not find the district court's finding clearly erroneous, we affirm its holding that the government's peremptory challenges were exercised in a constitutionally permissible manner." *Nicholson*, 885 F.2d at 483. *Accord United States v. Wilson*, 867 F.2d 486 (8th Cir. 1989), *cert. denied*, 493 U.S. 827 (1989).

Unlike the uncertainty of the prosecutors in both *Harrison* and *Cunningham*, relied upon by Petitioners, counsel for Dixie was certain of her reasons for striking the panel members because of her general practice. Counsel stated at the hearing, "I can tell this Court *for sure* that

the element of eyeball contact is the turning factor in every decision I make in every case that I try." (VI R. 8.) (Emphasis added.) Again counsel stated, "It was eyeball contact. I can tell you that *for sure.*" (VI R. 20.) (Emphasis added.)

Based upon the facts presented and because of the great deference afforded to the trial court's findings, the Fifth Circuit, as the Eighth Circuit in *Nicholson* and *Wilson*, affirmed the decision of the district court. This decision is not in conflict with the Third Circuit's holding in *Harrison* but is simply based upon a different factual situation. In all the cases, the appellate court upheld the district court's initial decision.

Next, Petitioners argue that the Fifth Circuit's decision conflicts with the Eleventh Circuit's opinion in *Barfield v. Orange County*, 911 F.2d 644 (11th Cir. 1990), *reh'g denied*, 920 F.2d 13 (11th Cir. 1990), *cert. denied sub nom. Barfield v. Lamar*, 111 S. Ct. 2263 (1991), in upholding eyeball contact as a legitimate reason. To the contrary, the Fifth Circuit's decision in this case is in accord with the Eleventh Circuit's opinion. In *Barfield*, the counsel explained his striking of a panel member as follows:

> I felt that Ms. Sills was looking at me, and looking at my client, and looking at the Defendant's table with an expression that conveyed to me some hostility, and it was my gut feeling, based on her facial expression that she was likely to not be fair and impartial to the Sheriff. For that reason, I feel that we should strike her.

Barfield, 911 F.2d at 646.

This is almost identical to the following statement made by Dixie's counsel at the hearing on this matter:

> A: It was eyeball contact. I can tell you that for sure, and on the eyeball contact, they either weren't looking at me or they were looking at me and I thought they were not listening to me when I had eyeball contact. You know as well as I do that some people roll their eyes, look away, some people have a smirk on their face. That is the gut feeling that I have to react on when I am selecting jurors.

(VI R. 20.)

Petitioners assert that in *Barfield*, the court "differentiated using 'body language' as a reason for exclusion, from using 'eye contact' as a reason for exclusion." Petition at 6. This is a mischaracterization of the Eleventh Circuit's holding. The court did not differentiate between body language and eye contact. To the contrary, the court stated, "In *Fludd* this court noted that 'eye contact with members of the venire and their expressions in response' were matters attorneys 'often take into account in exercising their peremptory challenges,' and matters the trial court may consider in deciding *Batson* questions." *Barfield*, 911 F.2d at 648 (quoting *Fludd v. Dykes*, 863 F.2d 822, 829 n.6 (11th Cir. 1989), *reh'g denied*, 873 F.2d 300 (11th Cir 1989), *cert. denied sub nom. Tiller v. Fludd*, 493 U.S. 872 (1989)). While noting that sometimes there would be nothing more than counsel's statement to support such reasons, the court continued, "To some extent, however, that is true of *any* explanation offered by counsel. The credibility decision is for the trial judge." *Barfield*, 911 F.2d at 648 n.1. The court concluded, "We hold that the

explanation offered for challenging prospective juror Sills was not legally insufficient as a matter of law. Stated otherwise, if the explanation is credible – and we assume on this appeal that it is – it is sufficiently clear and specific to pass muster under *Batson*." *Barfield*, 911 F.2d at 648. Petitioners' reliance on *Barfield* as creating a conflict among the circuit courts sufficient for this Court to grant their petition is clearly misplaced.

Not only is the Fifth Circuit's opinion in this case consistent with the Eleventh Circuit's holdings in *Barfield* and *Fludd*, it is also in accordance with opinions rendered in the Third, Seventh, and Eighth Circuits in which subjective reasons such as eye contact, lack of attentiveness, or the general demeanor of a prospective juror were cited as valid non-racial uses of peremptory strikes.

In *United States v. Casper*, 956 F.2d 416, 418-19 (3rd Cir. 1992), the court stated that the reason need not "be 'quantifiable' to be race neutral," and cited with approval the Fifth Circuit's decision in *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (prosecutor's observation of eye contact and demeanor was significant and constituted neutral explanation of peremptory exclusion).

The Seventh Circuit, in *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121 (7th Cir. 1992), was faced with an argument similar to that of Petitioners in this case. Nevertheless, the court held as follows:

> Mr. Galvin's testimony was that his intuitive judgment was based not on Mrs. Mitchell's race, but on her demeanor in the courtroom, on her appearing to look in Mrs. Dunham's direction, rather than at the court or at the defendant or at

> Mr. Galvin. This Court has stated that "[a]dequate explanations for exercising a peremptory strike may include a prosecutor's 'intuitive assumptions that are not fairly quantifiable.' " *Williams v. Chrans*, 957 F.2d 487, 490 (7th Cir. 1992) (quoting *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991)) . . . . In the present case, Mr. Galvin's intuitive judgment was based on the juror's specific behavior and demeanor in the courtroom; it is "a neutral explanation related to the particular case to be tried." *Batson*, 476 U.S. at 98 . . . .

Dunham, 967 F.2d at 1124-25. This court, too, cited to the Fifth Circuit opinion of *Lance*, 853 F.2d at 1181, in which eye contact was the stated reason.

Eye contact and demeanor have also been upheld as sufficient non-racial reasons in several cases from the Eighth Circuit. *See United States v. Swinney*, 970 F.2d 494, 496 (8th Cir. 1992) ("Government struck the second black juror because he wore dark sunglasses and 'a big gold watch' into the courtroom, and the prosecuting attorney was unable to establish eye contact with him"), *cert. denied*, No. 92-6413, 1992 WL 331988 (U.S. Nov. 30, 1992); *United States v. Todd*, 963 F.2d 207, 211 (8th Cir. 1992) ("venireperson . . . appeared inattentive, impatient, and hostile to the prosecutor"); *Reynolds v. Benefield*, 931 F.2d 506, 513 (8th Cir. 1991) (prospective juror "challenged because of the definite impression of the defendants that his facial expressions and body language indicated hostility"); *United States v. Sherrills*, 929 F.2d 393, 394 (8th Cir. 1991) ("prosecutor stated that she had challenged three of the blacks because they were inattentive").

In *Reynolds*, 931 F.2d at 512, the court made the following observation:

> It is well to note that feelings are not always expressed in words, and, indeed, may be clearly manifested by gestures and facial expressions. A grimace or stare may express hostility or displeasure quite as clearly as words shouted across a room. Much literature may be found on interpreting "body language" as a fundamental and effective practice in the selection of a jury. *See, e.g.*, 1 S. Schweitzer, *Cyclopedia of Trial Practice* § 144 (2d ed. 1970); 5 *Am.Jur.Trials* § 65 (1966) (valuable information can be obtained by observing a juror's demeanor). It has been noted that the "body language method" of jury selection "looks to a juror's appearance, behavior, and non-verbal responses, since these are viewed as giving a truer picture than verbal answers." T. Mauet, *Fundamentals of Trial Techniques* 32 (2d ed. 1988). It may also be relevant to note "the juror's attitude toward the lawyer." *Id.*

Petitioners' assertion that the Fifth Circuit's upholding of the neutral reason of eyeball contact for Dixie's use of peremptory strikes creates a conflict among the circuit courts is clearly without merit.

Finally, Petitioners argue that a writ should be granted in this case because the case is unique in excluding all members of a racial minority. However, courts have affirmed district courts' findings of no discrimination even when all minority members were stricken. *See, e.g., Dunham*, 967 F.2d at 1122; *Reynolds*, 931 F.2d at 508; *Barfield*, 911 F.2d at 646.

Interestingly, two of the cases cited by Petitioners are actually two earlier opinions from the Fifth Circuit. *Moore v. Keller Indus.*, 948 F.2d 199 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1945 (1992); *United States v. Terrazas-Carrasco*, 861 F.2d 93 (5th Cir. 1988). Obviously, these two opinions cannot be used to argue a conflict between the Fifth Circuit and other United States circuit courts necessitating a writ of certiorari in this case. Furthermore, although the Fifth Circuit stated in these cases that the fact that all minorities were not stricken "substantially support[ed] the finding of no discrimination," *Moore*, 948 F.2d at 202, *Terrazas-Carrasco*, 861 F.2d at 95, the court did not state the reverse – that excluding all members of a minority group would automatically result in a finding of discrimination. When presented with that argument in this case, the Fifth Circuit refused "to establish such a per se rule." *Polk*, 972 F.2d at 86.

As for the other two cases cited by Petitioners on this issue, Petitioners misrepresent the decision of the court in each of these cases. Petitioners contend that the Ninth Circuit in *United States v. Chincilla*, 874 F.2d 695 (9th Cir. 1989), held that the "[f]act that all minority members were excluded from jury panel requires the court to disallow purely subjectively based challenges." Petition at 6. Nowhere in *Chincilla* is such a requirement mandated. The court's discussion of the fact that all minority members were excluded was within the framework of determining whether a prima facie case had been established – the first step in the *Batson* procedure. *Chincilla*, 874 F.2d at 698. Such is not a contested issue in this case. Furthermore, although the court in *Chincilla* did reject the reasons articulated by the prosecutor, there is no indication

that this rejection was based on the striking of all the minority members. Rather, the court found certain inconsistencies and weaknesses in the prosecutor's explanations. *Chincilla*, 874 F.2d at 698-99.

Petitioners' reliance on the Second Circuit's decision in *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989), *reh'g denied*, 490 U.S. 1014 (1989), is an even greater enigma. Petitioners conclude from this case that "[g]eneral responses regarding 'lifestyle' and 'background' are inadequate when utilized to exclude all minority members." Petition at 6. The exclusion of all minority members, however, was not even an issue in this case. The defendant's argument was based on the prosecutor's striking of whites from the jury; nevertheless, the jury actually empaneled "consisted of three Whites and nine persons who were Black or Hispanic." *Roman*, 822 F.2d at 218. Consequently, this is not a case in which the exclusion of all minority panel members had any bearing whatsoever on the court's decision.

The Second Circuit in *Roman* merely upheld the lower court's decision that the various reasons given by the prosecutor were inadequate to rebut the prima facie case established by the defendant. The district court had "found that the reasons adduced by Levin [the prosecutor] for his challenges were circumlocutory, trivial, childish, incredible, and designed to cover up the ADA's discriminatory intent." *Roman*, 822 F.2d at 228. Because of the lower court's findings, the court stated as follows:

> The findings of the trial court are to be upheld on appeal unless they are clearly erroneous. Assessments of credibility of witnesses are peculiarly within the province of a trier of

> fact who has had an opportunity to view and hear the witnesses, and such assessments are entitled to considerable deference on review. Plainly the district court's decision to disbelieve the testimony of a witness who has appeared before it must be respected where the evidence adduced supports that decision.

Roman, 822 F.2d at 228 (citations omitted).

Because the Fifth Circuit's decision in this case does not conflict with decisions of other circuits, including those cited by Petitioners, the Polks' petition for a writ of certiorari should be denied.

CONCLUSION

Based on the foregoing discussion, Respondent Dixie Insurance Company respectfully requests this Court to deny the Polks' Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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